No. 47957-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN L. STREATER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 15-1-00135-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Streater was entitled to a jury instruction on a lesser included offense of unlawful display of a weapon. If he was, whether his counsel rendered ineffective assistance by failing to take exception to the failure to give a lesser included instruction.

2. Whether the court properly imposed a firearm enhancement.

3. Whether taking challenges for cause at sidebar during jury selection violated Streater's right to a public trial.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. Streater was not entitled to a jury instruction for a lesser included offense of unlawful display of a weapon because the facts cannot be construed to find that he committed only that crime to the exclusion of second degree assault with a deadly weapon.

At trial, Streater sought a jury instruction for the lesser-included offense of unlawful display of a weapon. RP 684-90.[1] As he notes in his opening brief, he apparently did not file his proposed instructions, but did make reference to Washington Pattern Instructions 133.41 and 133.40. RP 685. The court denied his request in a thoroughly explained ruling. RP 700-703.

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1 All references to the verbatim report of proceedings are to the five-volume trial transcript dated May 5, 6, and 21, 2015, and July 7-9, 2015.

A trial court's refusal to give a lesser included offense instruction is reviewed for abuse of discretion when the decision is based upon the facts of the case. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). When there is evidence to support the defendant's guilt solely on the lesser charge, the trial court's refusal to instruct on the lesser charge compromises a defendant's ability to present his theory to the jury and can constitute reversible error. State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981).

Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included offense is supported by the evidence. Vujosevic v. Rafferty, 844 F.2d 1023 (1988). Under Washington law, the defendant's right to a lesser included instruction is, in addition to his federal rights, a statutory right. RCW 10.61.006 provides:

> In all other cases [those not involving crimes with inferior degrees, RCW 10.61.003] the defendant may be found guilty of any offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). This two-prong test reflects consideration for the specific constitutional rights of the defendant, particularly his right to know the charges against him and to present a full defense. Peterson, 133 Wn.2d at 889. An inference that only the lesser offense was committed is justified "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

The party requesting the lesser included instruction must point to evidence that affirmatively supports the instruction and may not rely on the possibility that the jury will disbelieve the opposing party's evidence. Fernandez-Medina, 141 Wn.2d at 456; State v. Leremia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995). A reviewing court must view the supporting evidence in the light most favorable

to the party seeing the lesser included instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

Under the legal prong of the Workman test, unlawful display of a weapon is a lesser included offense of second degree assault. State v. Baggett, 103 Wn. App. 564, 569, 13 P.3d 659 (2000), *review denied*, 143 Wn.2d 1011, 21 P.3d 291 (2001). The trial court was correct, however, that Streater did not meet the factual prong of the Workman test; the evidence did not support an inference that only the lesser offense was committed.

Both the victim and Cababat testified that Streater pointed the handgun directly at the victim. RP 468, 470-72, 489, 554, 556. Cababat believed that Streater chambered a round as he hurried past Cababat into the apartment. RP 550. Streater admitted to doing so. RP 658. When the gun was recovered a short time later, it had a round in the chamber and 14 rounds in the magazine. The hammer was pulled back, making it easier to fire the weapon. RP 524-25. Streater and his friend Tavaro Som both testified that Streater held the gun down at his side and did not point it at the victim. RP 635, 661.

The elements of unlawful display of a weapon, as pertinent to the facts of this case, are (1) carrying, exhibiting, displaying, or

drawing a firearm, (2) in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another, or that warrants alarm for the safety of other persons. However, this offense does not apply to "any act committed by a person while in his or her place of abode or fixed place of business." RCW 9.41.270(1), (3)(a).

The jury was instructed as to the elements of second degree assault in Instruction No. 6. CP 77. Assault was defined in Instruction No. 7.

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 77.

The circumstances in this case do not lead to an inference that Streater committed the offense of unlawful display of a weapon to the exclusion of second degree assault. The acts of chambering a round and pulling back the hammer support the inference that Streater intended to create apprehension of bodily injury rather than merely intimidate another or cause alarm for the safety of other persons. An unloaded firearm would have accomplished the latter.

Further, Streater insisted that he was worried about Cababat doing him harm, but even by his own testimony he ignored Cababat entirely and focused his full attention on the victim. RP 657-659, 661-62, 674-75. He threw a light fixture at her, further indicating an intent to do more than intimidate her. RP 659.

In addition, it was impossible for Streater to have committed the crime of unlawful display of a weapon. RCW 9.41.270(3)(a) specifically provides that a person displaying a weapon inside of his "place of abode" cannot commit that crime. The statute does not define "abode" but courts have adopted the standard dictionary meaning as "the place where one abides or dwells." "Residence" and "home" are synonyms. State v. Owens, 180 Wn. App. 846, 853, 324 P.3d 757, *review denied*, 181 Wn.2d 1025, 339 P.3d 635 (2014).

Streater testified that the apartment where this act occurred was his. He testified that he had "purchased" the place two days before. RP 651. He had planned to move in on January 20th. RP 651. When he went there on January 24th it was to "rejoice the fact that I had a place." RP 652. He had keys to the apartment. RP 652. Streater had moved his belongings into the apartment earlier in the day. RP 654. He was irritated that Cababat was following

him around, "trying to get me out of my own house." RP 655. "Wasn't no right for him to tell me to leave from my own place." RP 656. "Upset that Kalai was ordering me out of my house, yes, ma'am." RP 665. There was no evidence to the contrary. The State has been unable to find any cases strictly on point, but logic dictates that a defendant is not entitled to an instruction for a lesser included crime for which he cannot be convicted. In this instance the factual prong of Workman has not been met and the trial court did not abuse its discretion.

a. Ineffective assistance of counsel.

The State does not claim that defense counsel waived a challenge to the trial court's denial of a lesser included instruction. Counsel presented lengthy argument on the issue. When he told the court that the final instructions were acceptable, RP 710, it seems logical that he was agreeing that, since the court had ruled against him, the instructions given were not otherwise objectionable. The State agrees that the issue was preserved for appeal. There was no ineffective assistance of counsel.

2. The trial court erred in imposing a firearm enhancement where the jury's special verdict only found that Streater was armed with a deadly weapon.

The State charged Streater with second degree assault while armed with a firearm. CP 6. The jury was instructed that a firearm is a deadly weapon. CP 79. The evidence at trial concerned no weapon other than a firearm. Nevertheless, the special verdict returned by the jury found that Streater was armed with a deadly weapon; the word "firearm" was not on that verdict form. CP 83. The trial court imposed a firearm enhancement. CP 89, 93.

The Supreme Court, in State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010), made it clear that a court may not impose the higher firearm enhancement without a specific finding by the jury that the weapon was a firearm. Id. at 898-99. The State concedes that this matter must be remanded for resentencing to impose the lower deadly weapon enhancement.

3. Taking for cause challenges to the jury venire at a sidebar, without a court reporter present, did not close the courtroom. There was no violation of Streater's right to a public trial.

The right of a criminal defendant to a public trial is protected by the constitutions of both the United States and the State of Washington. Prejudice is presumed when a violation occurs. State v. Rivera, 108 Wn. App. 645. 652, 32 P.3d 292 (2001). The right to a public trial applies to the evidentiary phases of the trial, and to other "adversary proceedings." "Thus, a defendant has the right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire." Id., at 652-53. A defendant may raise a public trial claim under article 1, sections 10 and 22 for the first time on appeal. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). The right to a public trial exists to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)(citing to federal cases).

When addressing a public trial question, reviewing courts follow a three-part analysis:

> First, we ask if the public trial right attaches to the proceeding at issue. Second, if the right attaches we ask if the courtroom was closed. And third, we ask if the closure was justified.

State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015).

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," State v. Lormor, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) (citing to Bone-Club, 128 Wn.2d at 257), or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

In Love, the for-cause challenges were taken at the bench, presumably out of the hearing of the jury pool and any other spectators, but on the record. There was minimal discussion.

> THE COURT: Any for-cause challenges?
>
> [DEFENSE]: Fifteen.
>
> THE COURT: Fifteen? Any objection?
>
> . . . .
> [STATE] I think that's—the state has no objection to No. 15 being struck for cause.
>
> THE COURT: Mm-hm. Any others?
>
> [DEFENSE]: Number 30.
>
> THE COURT: Number 30?
>
> [STATE]: Yeah. No objection.

Love, 183 Wn.2d at 602. The record of voir dire disclosed the responses of Jurors 15 and 30 that supported being struck for cause. Id.

The court in Love followed its previous decisions that the public trial right attaches to jury selection, including challenges for cause. Love, 183 Wn.2d at 606. It affirmed, however, because Love failed to show that the courtroom was closed. Id.

Streater distinguishes Love because in that case a court reporter recorded the exchange at sidebar. In this case, there apparently was no court reporter present. The challenges for cause took place in a sidebar that occurred just before the court took a recess at 10:06 a.m. CP 22. At 11:25 a.m. the court made a record of the sidebars. CP 23. The court said:

> Counsel, I want to just make a record of the sidebar that we had. It was actually after the first questioning period and four jurors were excused at that time. Jurors 5 and 10 were excused for hardship, and Jurors 9 and 39 were excused for cause based on answers they had given. There were no challenges for cause or hardship after the second questioning period when we had another sidebar before we began the jury selection.
>
> Is there anything else that I need to put on the record about sidebars?

RP 21. Both attorneys responded that there was nothing further to put on the record. RP 21.

This record contains at least as much information as the recorded exchange in Love. Anyone present in court or reading the transcript later would know that the jurors were excused for cause based upon their answers during voir dire. Streater does not claim that the jurors were not questioned in open court. Any member of the public seeking further information could obtain a transcript of voir dire if he or she was not present in court at the time. The

record was made by the court within an hour and a half of the time the challenges occurred, making it unlikely that the memories of the judge and counsel would have faded sufficiently to make the record suspect. All three—the judge, prosecutor, and defense counsel—agreed that this is what happened.

First, it cannot be said that the Love opinion relied so heavily on a transcript of the exchange at sidebar that the lack of such a transcript would turn the sidebar into a courtroom closure. The court in Love said:

> Yet the public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial missing in cases where we found closures of jury selection.

Love, 183 Wn.2d at 607.

Second, as noted above, the record made by the court following the sidebar contains all of the information that would have

been included in a transcript. The public should be able to reasonably rely on the accuracy of a record agreed to by both parties and the judge. Not only was that record made in open court, but the transcript is also publically available.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis. A record of what occurred at sidebar is available for inspection by the public. There was no violation of Streater's right to a public trial.

D. CONCLUSION.

Streater was not entitled to a lesser included instruction for unlawful display of a deadly weapon. Taking challenges for cause to the jury venire did not constitute a closing of the courtroom; there was no violation of Streater's right to a public trial. The court did err in imposing a firearm in the absence of a specific finding by the jury that he was armed with a firearm. This matter must be remanded for resentencing. The State respectfully asks this court to affirm all of Streater's convictions.

Respectfully submitted this 28th day of April, 2016.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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THOMAS EDWARD DOYLE
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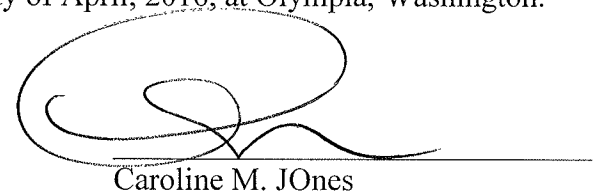
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28 day of April, 2016, at Olympia, Washington.



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